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**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**OAKLAND DIVISION**

THE ESTATE OF ISABELLA “BELLA”  
HERNDON, JOHN HERNDON, J.H., *a minor*,  
T.H., *a minor*,

*on behalf of themselves and others similarly  
situated,*

*Plaintiffs,*

v.

NETFLIX INC.,

*Defendant.*

Case No. 4:21-cv-6561-YGR

**Plaintiffs’ Statement in Response to Court  
Order Granting Anti-SLAPP Motion to  
Strike and Rule 12(b)(6) Motion to Dismiss  
and Requesting Plaintiffs’ Statement  
[Dkt. 74]**

**Judge:** Hon. Yvonne Gonzalez Rogers

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1 In the event of any of those three occurrences (or any combination of them), Plaintiffs intend  
2 to amend. Plaintiffs hereby reserve decision on the scope of such amendment, *i.e.*, reserve what  
3 changes the amendment (or request for amendment) would introduce. They could possibly, without  
4 limitation, introduce additional factual allegations, factual clarifications, additional parties,  
5 additional claims, additional remedies, *etc.* Plaintiffs reserve such decisions for a future time if an  
6 appellate court grants any of the relief described above.

7 Beyond the Court’s holdings on wrongful-death standing, Dkt. 74 at 3-4, and on survivor-  
8 claim statute of limitations, Dkt. 74 at 4, Plaintiffs believe that there is a fair prospect that  
9 amendment could affect the Court’s decisions to grant Netflix’s motions—and the scope of those  
10 decisions. Stated differently, but-for the Court’s holdings on wrongful-death standing and survivor-  
11 claim statute of limitations, Dkt. 74 at 3-4, Plaintiffs would take the Court up on its offer to permit  
12 amendment, Dkt. 74 at 5-6.

13 For example, the Court held that anti-SLAPP step one is met for both claims and that the  
14 threshold exceptions do not apply. Dkt. 74 at 2-3, 2 n.2, 3 n.3, 3 n.4. Plaintiffs believe that there is  
15 a fair prospect that amendment could affect the Court’s holding on those issues. The Court also  
16 decided issues on the state-law claims regarding products liability, Dkt. 74 at 4, 4 n.5, and Netflix’s  
17 duties, Dkt. 74 at 4-5, 5 n.7. Again, Plaintiffs believe that there is a fair prospect that amendment  
18 could affect the Court’s holding on those issues.

19 Finally, the Court did not need to decide the pleading of causation because it held that there  
20 was no duty or products liability here. See Dkt. 74 at 4-5, 4 n.5, 5 n.7; see also Dkt. 28 at 30-31  
21 (Netflix’s causation argument), Dkt. 53 (Plaintiffs’ causation response). Likewise, the Court  
22 exercised Constitutional avoidance, avoiding First Amendment issues. Dkt. 74 at 5 (bullet point  
23 starting “Finally” and invoking “doctrine of constitutional avoidance”). There was no need for the  
24 Court to decide First Amendment issues at this time. See id. Thus, on these issues too, it is  
25 possible that amendment could affect the disposition of the motion and, accordingly, Plaintiffs  
26 reserve the right to amend or seek amendment, either before a court renders decision on these  
27 undecided issues or after a court decides them. There is a fair prospect that amendment could affect  
28 decision on these undecided issues.

Pragmatic and prudential considerations militate against amendment at this time. The Court's procedural rulings were dispositive of the Court's treatment of Plaintiffs' claims here. While amendment could permit Plaintiffs to plead additional facts, clarify certain aspects of the claims, or add additional legal claims, Plaintiffs do not wish to burden this Court, opposing party and counsel, or Plaintiffs' dedicated team of resource-limited, nonprofit counsel with amendment at this time, given both the Court's dispositive resolution of the claims on procedural issues and given Plaintiffs' challenges to this Court's jurisdiction.

Rather it is more pragmatic, prudential, and parsimonious to proceed with appellate review of Plaintiff's jurisdictional challenges and of the Court's procedural rulings barring Plaintiffs' claims. Accordingly, Plaintiffs respectfully request that the Court acknowledge that Plaintiffs have registered and preserved their intention to amend should either (1) the procedural bases of the dismissal be reversed, or (2) the jurisdiction of this Court be reversed, vacating the Court's substantive rulings.

Amendment could then be appropriately made (or sought) at that time. Such an approach seems like the most pragmatic and efficient way to proceed with this matter, so as to avoid any unnecessary burden on judicial resources and any unnecessary litigation costs.

Finally, nothing in this Statement should be construed as a waiver or forfeiture of any right to appeal any and all issues. Plaintiffs hereby reserve all rights.

\* \* \* \* \*

Plaintiffs hereby submit that amendment would be futile *at this time*. Accordingly, this Court should acknowledge Plaintiffs' intention to amend if they obtain any of the relief described above and enter judgment based on the Order.

1 DATED: January 19, 2022

Respectfully submitted,

2 /s/ Rory Stevens

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing *STATEMENT* on:

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via **electronic filing** in CM/ECF.

Dated: January 19, 2022

/s/ Rory Stevens

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